

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of	
Connect America Fund	WC Docket No. 10-90
A National Broadband Plan for Our Future	GN Docket No. 09-51
Establishing Just and Reasonable Rates for Local Exchange Carriers	WC Docket No. 07-135
High-Cost Universal Service Support	WC Docket No. 05-337
Developing a Unified Intercarrier Compensation Regime	CC Docket No. 01-92
Federal-State Joint Board on Universal Service	CC Docket No. 96-45
Lifeline and Link-Up	WC Docket No. 03-109

**PAC-WEST TELECOMM, INC. REPLY COMMENTS ON SECTION XV
AND COMMENTS ON SECTIONS X-XIV.**

Michael B. Hazzard
Adam D. Bowser
Jason A. Koslofsky
ARENT FOX LLP
1050 Connecticut Avenue, NW
Washington, DC 20036-5369
(202) 857-6000
hazzard.michael@arentfox.com
bowser.adam@arentfox.com
koslofsky.jason@arentfox.com

Counsel for Pac-West Telecomm, Inc.

April 18, 2011

SUMMARY

Pac-West Telecomm, Inc. (“Pac-West”) submits these Reply Comments responsive to Comments of other carriers addressing Section XV¹ and also submits hereby these Comments to address Sections X-XIV of the NPRM. Pac-West again encourages the Commission to modernize the intercarrier compensation regime to eliminate unsupported distinctions between types of traffic and types of carriers. Specifically, Pac-West proposes that: 1) VoIP traffic should be treated the same as traditional TDM traffic and 2) the Commission should eliminate the arbitrage opportunities being taken advantage of by CMRS providers on CMRS-CLEC traffic. On overall intercarrier compensation reform, Pac-West recognizes that intercarrier compensation rates may be reduced over time, but supports a gradual, disciplined, and nondiscriminatory reduction if the Commission decides to reduce intercarrier compensation rates. Pac-West would support a unified rate that applies to all types of traffic and includes reasonable network cost recovery to allow competitive carriers like Pac-West to compete with the incumbent carriers.

Pac-West urges the FCC to adopt a regulatory framework that will remove market distortions and provide the regulatory certainty that new entrants require to compete in the telecommunications sector.

¹ Pac-West also filed comments on Section XV. Comments of Pac-West Telecomm, Inc. filed April 1, 2011 (“Pac-West Comments”) in *In re Connect America Fund*, WC Docket No. 10-90; *A National Broadband Plan for Our Future*, GN Docket No. 09-51; *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135; *High-Cost Universal Service Support*, WC Docket No. 05-337; *Developing an Intercarrier Compensation Regime*, CC Docket No. 01-92; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45; *Lifeline and Link-Up*, WC Docket No. 03-109, NPRM & FNPRM, FCC 11-13 (rel. Feb. 2011) (“NPRM”).

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(202) 857-6000
hazzard.michael@arentfox.com
bowser.adam@arentfox.com
koslofsky.jason@arentfox.com

Counsel for Pac-West Telecomm, Inc.

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I. THE COMMISSION SHOULD SIMPLIFY THE INTERCARRIER COMPENSATION SYSTEM

A. VoIP Traffic Should Be Treated Identically To All Other Traffic.

As Pac-West explained in its initial comments, there does not appear to be any good reason to treat VoIP traffic any differently from traditional TDM traffic.² VoIP has many of the same characteristics of traditional telecommunications traffic and is already subject to many of the same Commission rules.³ Should the Commission create a new category of traffic for VoIP, it would be creating disfavored “artificial regulatory distinctions”⁴ because similar traffic would be treated differently. Ultimately, the simplest, fairest and most cost-effective option for the Commission is simply to treat IP-based traffic as identical to any other type of traffic.

Commenters who suggest otherwise would create arbitrary distinctions between types of traffic that may be difficult to discern as Verizon has noted.⁵ Although Verizon now apparently would create a new category of traffic for VoIP contrary to its prior advocacy,⁶ the Commission would not create a workable solution by treating VoIP traffic differently if it’s impossible to determine the difference in the first place. The Commission’s focus in this proceeding should be on simplifying the intercarrier compensation system – not complicating it further.

² Pac-West Comments at 5-11.

³ *Id.* at 6-7.

⁴ *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, 4702, ¶ 33 (2005).

⁵ Verizon and Verizon Wireless Comments – NBP Public Notice #19 at 17-18, GN Docket No. 09-51, *et al*, filed Dec. 7, 2009.

⁶ Comments of Verizon and Verizon Wireless at 15, NPRM, GN Docket No. 10-90, *et al*, filed April 1, 2011 (“Verizon Comments”).

Pac-West does agree with Verizon that the Commission should not take any action that would disrupt existing agreements between carriers.⁷ In a world where all carriers have equal bargaining power, commercially negotiated agreements would be the perfect solution. But the Telecom Act is based on state-supervised commercial arbitrations specifically because the telecom marketplace contains a mixture of large, dominant incumbent carriers, and smaller new entrant competitors with significantly less market power. As such, the Commission must ensure that the nation's largest carriers do not take advantage of their size to exert pressure on smaller carriers through, for example, nonpayment of access charges to force unfavorable agreements. The largest carriers have repeatedly refused to pay on routine invoices, and then demanded below-market contractual rates as a prerequisite to releasing the dollars withheld. Pac-West has experienced many instances where RBOCs have granted commercial terms to one CLEC, then refused to grant the same terms to Pac-West.

When RBOCs withhold payments in order to create leverage, they force CLECs to choose between below-market rates and foregoing millions in payments on their invoices. Forcing CLECs to make such a Hobson's choice is inconsistent with clear Commission precedent.⁸ Self-help by the nation's largest carriers disrupts the intercarrier compensation regime and is anticompetitive. As Pac-West urged, the Commission should issue rules limiting the right of carriers to refuse to pay tariffed access charges, and instead require these carriers to assert their rights through legitimate legal channels such as the Commission's complaint process, the state public utility commissions, or the courts. The Commission should also turn a wary eye

⁷ *Id.* at 6 n.3.

⁸ Pac-West Comments at 17-19.

on any proposal that relies upon “commercial” agreements to supplant the carefully conceived and implemented federal/state regulatory framework of the Telecom Act.

B. The Commission Should Streamline The Process For CLECs To Obtain The Reasonable Compensation Owed To Them By CMRS Providers.

The Commission seeks to end arbitrage opportunities through the NPRM. CMRS providers have taken advantage of one of the country’s largest arbitrage opportunities by pouring traffic onto CLEC networks, but refusing to make legally required payment for the transport and termination services that they hungrily consume. CMRS providers have increasingly refused to pay CLECs for the work they perform in terminating the CMRS providers’ customers’ calls. Pac-West proposes that the Commission simply reaffirm the authority of state commissions to set compensation rates, making it clear that current law requires compensation and encourages state commission proceedings to resolve these issues. This is the position the Commission took in the *North County* complaint proceeding and the Commission should forcefully press that position in this proceeding. Any deviation from the course the Commission itself has established will only encourage wireless carriers to continue to withhold substantial past due payments.⁹ In order to strengthen the compensation currently required by the Commission’s rules, CLECs should be granted the same arbitration rights now possessed by ILECs by the *T-Mobile Declaratory Ruling*.¹⁰ As it currently stands, CMRS providers simply refuse to pay CLECs and take advantage of an arbitrage opportunity to pass their cost-causing activity, terminating traffic, onto the CLEC.

⁹ Not all CMRS providers have taken advantage of this arbitrage opportunity. At least two carriers have long since entered into traffic exchange agreements with Pac-West and have responsibly abided by those agreements, without any of the catastrophic consequences predicted by the CMRS providers commenting here.

¹⁰ *In the Matter of Developing a Unified Inter-carrier Compensation Regime; T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs,*

Proposals by the wireless carriers to address CMRS-CLEC traffic, not surprisingly, would only continue the opportunity for CMRS providers to refuse to pay or otherwise exert pressure over smaller CLECs. Sprint would conveniently subject all CMRS-CLEC traffic to bill-and-keep in the absence of an interconnection agreement.¹¹ This is not surprising because Sprint, like T-Mobile, Verizon, and Leap, has been unwilling to enter into such an agreement with Pac-West. Together, these four carriers have aggressively opposed Pac-West's efforts to collect on literally years and years of minutes of use in California. Permitting free termination for those carriers who refuse agreements runs contrary to the Commission's rules (47 C.F.R. § 20.11(b)(2)) and to the Commission's recent *North County* decision finding that "reasonable compensation" is due for CMRS termination. Allowing carriers to obtain free termination simply by refusing to enter into agreements is to encourage those CMRS providers who have refused to bargain fairly with CLECs, while punishing those who have responsibly entered into agreements.

Verizon also argues that the Commission should "establish a default termination rate of \$0.0007 per minute for that intraMTA traffic, in the absence of a negotiated interconnection agreement, to stabilize the CMRS-CLEC compensation regime."¹² The Commission has very recently delegated to the state commissions the role of determining "reasonable compensation." The Commission should stay its course and allow the state commissions to make the determination as to what is reasonable. Although Verizon reflexively turns to the \$0.0007 rate, that rate is: a) the lowest regulated rate available to terminate traffic; and b) not a cost-based

Declaratory Ruling and Report and Order, 20 FCC Rcd 4855 (2005) (*T-Mobile Declaratory Ruling*).

¹¹ Comments of Sprint Nextel Corporation at 22, NPRM, GN Docket No. 10-90, *et al*, filed April 1, 2011 ("Sprint Comments").

¹² Verizon Comments at 6 n.3.

rate, rejecting years of TELRIC cost proceedings based on the Commission's own TELRIC standard and assiduously implemented over the years of proceedings at the state commissions. The costs of transporting and terminating a call on a landline network do not vary based upon whether the call comes from a CMRS provider or a landline provider. The Commission should therefore support cost-based compensation for intraMTA traffic. There is nothing "reasonable" about bill-and-keep arrangements or a default \$0.0007 rate, when the ILECs with which Pac-West competes have secured market-based switching rates in excess of \$0.01 per minute for the same services Pac-West provides.¹³ These proposals, and ones like them, ignore the reality that the CMRS providers are the cost-causers, using services of CLECs but avoiding payment altogether. Thus, Pac-West urges the Commission to make clear that states have the right to set reasonable compensation rates, consistent with landline compensation arrangements in place today, and to award retroactive compensation for traffic previously invoiced, consistent with the Commission's rules and other precedent. Moreover, CLECs should be given the same arbitration rights now possessed by ILECs pursuant to the *T-Mobile Declaratory Ruling*. These two steps would eliminate the CMRS providers' arbitrage scheme of simply refusing to pay CLECs for terminating the CMRS providers' customers' traffic.

C. The Commission's Proposed Signaling Rules Should Not Disrupt Legitimate Practices.

Pac-West joins with other commenters urging the Commission to ensure that the proposed changes in the call signaling rules do not add additional costs or unnecessarily interfere

¹³ See Calif. Pub. Util. Comm. D. 06-05-040, Decision Confirming the Assigned Administrative Law Judge's Ruling Granting in Part the Motion for Enforcement of Decision 06-01-043, *Application of Pacific Bell Telephone Company d/b/a SBC California for Generic Proceeding to Implement Changes in Federal Unbundling Rules Under Sections 251 and 252 of the Telecommunications Act of 1996*, Application 05-07-024 at 3-4 (May 25, 2006) (approving switching rate for AT&T of \$0.0111 per minute).

with the legitimate signaling practices of the many companies that currently make standard use of the signaling fields for constructive purposes.¹⁴ As such, Pac-West agrees with Verizon’s recommendation that the Commission “make certain important modifications to avoid unintended consequences and to acknowledge certain technical realities” in how companies actually exchange signaling information.¹⁵ Indeed, as AT&T explains, “carriers must be free to depart from the call-signaling content rules in certain limited circumstances” in accord with “[legitimate] standard industry practice and technology concerning call-signaling content.”¹⁶

As currently drafted, the proposed rules regarding population of the CPN and CN fields could disrupt legitimate existing industry practices – practices which are common, legal, and facilitate the exchange of traffic regardless of whether or not those practices are included in a “published” industry standard.¹⁷ Specifically, as PAETEC notes, “many providers need to populate the CN with a number associated with its network and customer even when the customer sends originating CPN with the call.”¹⁸ Such practices are common among many different types of carriers. For instance, carriers that provide termination to the PSTN for VoIP providers may need to include information in the CN identifying the VoIP provider – even if the VoIP provider in question included in the passed-signaling information the CPN identifying the actual called party.¹⁹ In another example, AT&T explains that its legacy network often uses

¹⁴ Verizon Comments at 48; Comments of AT&T Inc. at 23, NPRM, Docket No. 10-90, *et al*, filed April 1, 2011 (“AT&T Comments”); PacWest Comments at 8-9.

¹⁵ Verizon Comments at 48.

¹⁶ AT&T Comments at 23.

¹⁷ Comments of PAETEC Holdings Corp., Mpower Communications Corp. and U.S. TelePacific Corp., and RCN Telecom Services, LLC at 9, NPRM, Docket No. 10-90, *et al*, filed April 1, 2011 (“PAETEC Comments”).

¹⁸ *Id.* at 8.

¹⁹ *Id.* at 9

internal CNs that may be either a pseudo-NANP number or a number for a private numbering plan as a means of facilitating end-user billing.²⁰ Both of these are legitimate practices, and Commission rules should not forbid them. As a general principle, the Commission's rules should avoid imposing new, unnecessary costs for signaling (particularly during the transition to an IP-based network) and be sensitive to carriers' existing legitimate call-routing processes.

Pac-West also joins with PAETEC in urging the Commission to consider adopting rules similar to the Entry/Exit Surrogate (EES) rules for originating providers that do not receive CPN from their customers. The Commission should allow the originating provider to include information in CN fields to associate the call with information reflecting the network and the customer for whom it is originating that traffic when CN is not already included. This information should then be available for determining the jurisdiction of a call when the original billing information is inadequate. Such rules would be consistent with widespread industry practice and the proposed signaling rules.²¹

PacWest also joins commenters urging the Commission to consider modifying its proposed rules to clarify that all call signaling data should be passed on by a service provider to the next provider in the call flow.²² Currently, the text of the proposed rule appears to be limited to CPN, CN, and ANI. However, all call signaling fields, including the CIC, OCN, and LRN

²⁰ AT&T Comments at 24.

²¹ *See, generally, Amendment of Part 69 of the Commission's rules Relating to the Creation of Access Charge Subelements for Open Network Architecture; Policy and rules Concerning Rates for Dominant Carriers*, CC Docket Nos. 89-79, 87-313, Report and Order and Order on Further Reconsideration and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524 (1991); *Amendment of Part 69 of the Commission's rules Relating to the Creation of Access Charge Subelements for Open Network Architecture*, Docket No. 89-79, 8 FCC Rcd 3114, ¶ 22 (1993).

²² *See, e.g.,* Section XV Comments of the Nebraska Rural Independent Companies at 20-25, NPRM, Docket No. 10-90, *et al*, filed April 1, 2011; Sprint Comments at 26; PAETEC Comments at 13.

would be useful to determine the appropriate rate and the party to bill for the call. As such, the rules should require all carriers, including carriers providing intermediate or tandem services, to pass through all such signaling fields, wherever technically feasible.

D. The Commission Should Proceed Cautiously With Traffic Pumping.

The controversy generated by “traffic pumping” and “access stimulation” does not require the Commission to act in unprecedented ways. The Commission should reject any proposals to create new categories of traffic in its efforts to resolve “access stimulation.” No one disputes that high-volume traffic is just as compensable as low-volume traffic – the fact that there is more of it does not alter compensation requirements. As Pac-West previously explained, one-way traffic flows do not somehow alter the character of the traffic and the Commission should be wary of deciding some traffic is “good” and other traffic is “bad.”²³ The appropriate response to “traffic pumping” or “access stimulation” is not new categories of traffic, but to establish a unified rate that applies to all traffic and includes a cost recovery mechanism as described below. Creating new categories of traffic and favoring certain categories over others will only lead to more disputes between carriers, not less. Allegations of “traffic pumping” will simply continue to be talisman that carriers will invoke every time they refuse to pay.

In fact, the very same carriers that advocate for aggressive “access stimulation” rules are sending high volumes of traffic to CLECs for free termination. As Pac-West describes above, CMRS providers send millions of minutes to Pac-West and yet refuse to pay for the services they take from Pac-West. A new “access stimulation” or “traffic pumping” category of traffic would simply provide those carriers, as well as carriers that currently pay their invoices, with an Commission-sanctioned excuse to avoid payment and engage in self-help to the detriment of

²³ Pac-West Comments at 15.

competition and smaller carriers. Nonpaying carriers, such as many CMRS providers, already demand that smaller carriers turn their businesses inside out to make a subjective analysis of “traffic pumping” before paying. Sanctioning “traffic pumping” as a recognized category of traffic would give new impetus to such self-help efforts and encourage other carriers to join the fray. The Commission should not overreact to the controversy surrounding “access stimulation” and consider every consequence to any new rule.

II. OVERALL INTERCARRIER COMPENSATION REFORM: PAC-WEST COMMENTS ON SECTIONS X-XIV

Pac-West encourages the Commission to reform the intercarrier compensation regime, but to consider the impact on competition and smaller carriers. Pac-West understands that intercarrier compensation rates are very likely going to be reduced over time for a variety of reasons, and may be reduced as a result of this NPRM. In order to ensure a smooth transition for carriers across the industry, any reduction in rates should be gradual, incremental, predictable, and nondiscriminatory. A reduction in rates should include a nondiscriminatory cost recovery mechanism to ensure that CLECs such as Pac-West continue to have a strong foothold to compete with the ILECs. In achieving a reduction in rates, the Commission should not subject facilities-based carriers and network providers across the industry to rate shock by dramatically and suddenly reducing rates.

If the Commission is inclined to reduce rates, Pac-West submits that the ideal way to achieve that result is through a unified intercarrier rate. A unified rate will reduce intercarrier compensation disputes because carriers that owe those rates will have less incentive to dispute bills or “re-rate” traffic based on arbitrary or legally-unsupported distinctions in the type of

traffic.²⁴ As long as some category of lower rate exists, carriers like the IXCs will have an incentive to dispute bills to obtain the lower rate. If the Commission proliferates the categories of traffic (*e.g.*, providing its imprimatur to “VoIP,” “traffic pumping,” “phantom traffic,” or “access stimulation”) definitional disputes will abound, providing larger carriers a playbook as to how to refuse payment to smaller carriers. While Pac-West strongly supports a unified intercarrier rate, it should benefit all carriers, not just the nation’s largest.

In establishing a unified rate, the Commission must make clear that any unified rate established by the Commission applies to all traffic, regardless of technology.²⁵ A unified rate should apply to VoIP and traditional TDM traffic equally. Moreover, the Commission must make sure that a unified rate includes reasonable network cost recovery.²⁶ Cost recovery to deploy networks is consistent with the Commission’s goals of increasing network development. If carriers are expected to have an obligation to handle traffic handed off by other carriers, they must be fairly compensated for the transport and termination work performed by their switches and networks. This principle of cost-based compensation, providing for compensation at cost plus a reasonable profit is embedded in Section 251(b)(5) of the Telecom Act. If the unified rate has no basis in cost and is so low that smaller carriers cannot recover costs through the rate, competitive carriers will not be able to compete with the largest carriers who are able to broadly carry and terminate traffic on their own networks. If the Commission decides to reduce overall

²⁴ As noted by many other carriers, relying on the fact that the Commission’s has not addressed the regulatory status of VoIP, Verizon has unilaterally and arbitrarily rated VoIP traffic at \$0.0007 and then underpaid or refused to pay those carriers. *See* Comments of Cbeyond, Inc., Integra Telecom, Inc., and TW Telecom, Inc. at 5, NPRM, Docket No. 10-90, *et al*, filed April 1, 2011; Comments of Cox Communications, Inc. at 3, NPRM, Docket No. 10-90, *et al*, filed April 1, 2011 (“Cox Comments”).

²⁵ Cox Comments at 4 n.3.

²⁶ PAETEC Comments at 38-42.

intercarrier compensation rates, Pac-West supports a unified rate that applies to all types of technologies and has some basis in cost. And, Pac-West urges the Commission to undertake any reduction in a gradual, nondiscriminatory manner.

The Commission should also be wary of its statutory authority when engaging in the proposed intercarrier compensation reform. As one of its alternative proposals, the Commission proposes to use section 251(b)(5) and apply it to “all telecommunications traffic exchanged with LECs, including intrastate and interstate access traffic.”²⁷ The Commission should be cautious, however, of stretching section 251(b)(5) beyond its clear language which only applies to “local exchange carrier[s]” and not to IXC. Any steps taken by the Commission to reform the intercarrier compensation regime should be based in clear law and not rely on stretching section 251(b)(5) beyond its clear language. Congress specifically preserved the access charge regime through section 251(g), and if the Commission replaces it, a new regime would only be reasonable if it includes reasonable network cost recovery.

If the Commission is inclined to reduce rates, the Commission would be better served to follow the general outline of the National Broadband Plan by first reducing intrastate access rates to interstate levels, and then over time reducing interstate access to the state commission delineated section 251(b)(5) reciprocal compensation rates. Establishing that VoIP should be treated like TDM traffic at the outset, the rates for VoIP traffic would then trend downwards on the same schedule as all other rates.

Pac-West’s proposal does deviate from the National Broadband Plan, and from some of the Commission’s alternative proposals in the NPRM, in one critical aspect: forced bill-and-keep is illegal pursuant to the Telecom Act and the Commission’s rules and orders. In order to

²⁷ NPRM ¶ 512.

conserve resources and keep the proceeding focused, the Commission should not consider alternatives that the Commission itself has specifically found to be outside the bounds of the law. Pursuant to the Act, bill and keep is only permitted when carriers have waived their right to compensation. 47 U.S.C. § 252(d)(2)(B)(i). Given that such waiver is very much the exception and not the rule in the industry, the Commission should be focused on the establishment of cost-based rates. If the Commission succeeds in establishing uniform cost-based rates for all traffic, it will take a significant step forward within the bounds of the Telecom Act. But, if it goes beyond that it will be acting *ultra vires* under current law and undermining the ability of carriers to recover on billions of dollars of network investment. The Commission has set out most of the incremental steps to responsible intercarrier compensation reform, but should consider its mission accomplished when it reaches a uniform cost-based rate.

III. CONCLUSION

Pac-West appreciates the Commission's willingness to fix the many broken aspects of the current intercarrier compensation system, and trusts that all consumers will benefit by fair, consistent, and incremental intercarrier compensation reform.

Respectfully submitted,

/s/
Michael B. Hazzard
Adam D. Bowser
Jason A. Koslofsky
ARENT FOX LLP
1050 Connecticut Avenue, NW
Washington, DC 20036-5369
(202) 857-6000
hazzard.michael@arentfox.com
bowser.adam@arentfox.com
koslofsky.jason@arentfox.com

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